101726-0

No. 38761-5-III

SUPREME COURT
OF THE STATE OF WASHINGTON

MARC R. KEITH, Petitioner,

v.

FERRY COUNTY, WASHINGTON and
ALL PERSONS CLAIMING ANY RIGHT,
TITLE OR INTEREST IN THE REAL
PROPERTY DESCRIBED HEREIN,

Respondent.

PETITION FOR REVIEW

Marc R. Keith
31013 24th Ct. S.
Federal Way, WA 98003
(315) 236-0496

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The full text of all cited statutes are included in appendix.

A. IDENTITY OF PETITIONER

Marc R. Keith (Mr. Keith) respectfully petitions the Supreme Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition. Mr. Keith, elderly and dependent on Social Security, petitions pro se because he can no longer afford legal counsel in the seventh year of litigation.

B. COURT OF APPEALS DECISION

Mr. Keith requests review of *Keith v. Ferry County,* No. 38761-5-III, (Wash. Ct. App. Dec. 06, 2022) (unpublished) Mr. Keith's Motion for Reconsideration was denied on Jan. 24, 2023. A copy of the Court of Appeals opinion and the order denying motion for reconsideration are included in the appendix.

C. ISSUES PRESENTED FOR REVIEW - RAP 13.4 (b)(1)

Issue 1. The Supreme Court held in *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263, (1989), and *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995), that conveyance of a right-of-way shall be by deed and recorded, citing RCW 64.04.010. Should

review be granted where the record contains no deed evidencing conveyance of a right-of-way to Ferry County, when the Court of Appeals cited its own cases in conflict with the Supreme Court to hold, "A formal conveyance by deed is not required" *Keith v. Ferry County* No. 38761-5-III (unpublished) (2022), Pages 5-6. (Appendix P. 5)

CONSTITUTIONAL QUESTION OF LAW - RAP 13.4 (3)

Issue 2. Was it constitutional under the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 3 and 16 of the Washington State Constitution for Ferry County to hold a land-use hearing without notice to Mr. Keith, resulting in county commissioner resolution 2016-21, which retroactively took his deeded and recorded property?

D. STATEMENT OF THE CASE

In 1991, the Wutzke and Schinnell families applied for a short plat to divide their 20-acre parcel into four lots. (CP-011) An offer of right-of-way for Empire Creek Road was placed on the

survey as a condition of filing. (Short Plat Ordinance 72-1, 23.00, CP 277)

On June 1, 1992, the short plat was approved and filed by the Ferry County platting administrator under RCW 58.17.060. After filing, the owners exchanged reciprocal quit-claim deeds. The 1992 quit-claim deed to Lot one conveyed all interest to its grantee, Mr. Keith's predecessor in interest. (CP-389) No right-of-way deed was created or recorded pursuant to the offered grant of right-of-way on the survey.

The planning agency filed the short plat with the auditor on June 1, 1992. For the next 24 years, lot one was conveyed and taxed as real property, including the disputed right-of-way, which was assigned a separate parcel number, 33805340003101, and taxed separately from the rest of lot one, 33805340003100. (CP-004)

On July 25, 2016, the Ferry County Commissioners enacted resolution 2016-21, (CP-026) which retroactively recognized the

planning department *had* accepted the Empire Creek Road as shown on the short plat.

On May 15, 2017, Mr. Keith brought action (CP-001) for declaratory judgment to quiet title in himself to the disputed area, on the strength of his statutory warranty deed, (CP 017-018) seven years occupation, payment of taxes, (CP 020-023) and inverse condemnation (CP-006) in violation of RCW 58.17.150, which requires legislative body approval of dedications.

Ferry County prosecuting attorney Kathryn Burke filed an answer to the complaint on June 2, 2017, (CP-027) admitting Mr. Keith pays separate taxes on his house (#….3100) and road parcel. (#....3101) (CP-029)

On August 19, 2019, Mr. Keith filed a motion for summary judgement (CP-032) to quiet title in the disputed right-of-way on the strength of his statutory warranty deed, (CP 018-019) payment of taxes, (CP 020-023) and record of conveyances. (CP-077)

Ferry County filed a cross-motion for summary judgment of dismissal on November 7, 2019, (CP-084) pleading the act of filing the short plat by the planning agency with a dedication on its face, constituted acceptance of the dedication. (CP-093) Ferry County included with the cross-motion for dismissal an affidavit from the chief deputy tax assessor, Coleen Cox, (CP 131-132) denying under oath that Mr. Keith pays separate taxes on the disputed right-of-way. (CP 291-295, 323-324, 402-410) The summary judgment of dismissal was granted by Ferry County Superior Court on April 7, 2020. (CP 239-240)

In 2020, Mr. Keith appealed to the Court of Appeals, which affirmed the dismissal. *Keith v. Ferry County*, No. 37526-9-III, slip op. at 2-7 (Wash. Ct. App. Mar. 30, 2021) (unpublished) (CP 242-258).

On November 22, 2021, Mr. Keith filed a CR 60 (b)(4) motion in Ferry County Superior Court, (CP 259-308) alleging the summary judgment of dismissal was obtained by fraud, (CP 266-267) forgery, (CP 300-302, 425-432) and misrepresentation

through perjury. (CP 131-132, 291-295) It was denied January 31, 2022. (CP 498-502) Mr. Keith appealed to the Court of Appeals, (CP 504-509) which affirmed on December 6, 2022. *Keith v. Ferry County,* No. 38761-5-III, (Wash. Ct. App. Dec. 06, 2022) (unpublished) (Appendix. P. 1) Mr. Keith filed a motion for reconsideration, which was denied on January 24, 2023. (Appendix. P. 13) Mr. Keith seeks review by the Supreme Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Issue 1. Conveyance of a right-of-way shall be by deed.

In 1989, the Supreme Court held that conveyance of a right-of-way shall be by deed, pursuant to RCW 64.04.010.

Kesinger v. Logan, 113 Wn.2d 320, 779 P.2d 263, (1989) (hereinafter *Kesinger*)

> We consider one principal issue as being dispositive of the case.
>
> Issue
>
> Under the facts as stated, is Mrs. Kesinger entitled to an order quieting title in her to the disputed strip of

> property near the irrigation canal where the record contains no deed conveying the irrigation canal right of way from the original landowners to Mr. Rankin, the District's predecessor in interest?
>
> Decision
>
> Conclusion. The conveyance of an interest in real property must be by deed. Since the record before us contains no evidence of a deed of the canal right of way from the original landowners to Mr. Rankin, the District's predecessor in interest, the District holds no interest in the disputed property. Mrs. Kesinger, therefore, was entitled to the order quieting title in her to the property in question.

Likewise, the Supreme Court in *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995),

> Under RCW 64.04.010, "every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed . . .". Every deed "shall be in writing, signed by the party bound thereby, and acknowledged . . .". RCW 64.04.020. Although it is an incorporeal right, an easement is an interest in land. *See Perrin v. Derbyshire Scenic Acres Water Corp.,* 63 Wn.2d 716, 388 P.2d 949 (1964). An express grant of easement is a conveyance within the meaning of the statute of frauds, *E.g., Ormiston v. Boast,* 68 Wn.2d 548, 550, 413 P.2d 969 (1966)

The Supreme Court continued in *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995)

> However, in the case of an easement, a "*deed [of easement]* is not required to *establish the actual location* of an easement, but *is required to convey an easement" which encumbrances a specific servient estate.* (Some italics ours.) *Smith v. King,* 27 Wn. App. 869, 871, 620 P.2d 542, 24 A.L.R.4th 1049 (1980) (citing cases)

In the instant case, it's undisputed by Ferry County that no deed conveying a right-of-way easement across Mr. Keith's Lot 1 was created or recorded. Mr. Keith pleaded the holding in *Kesinger* as binding authority. The Court of Appeals *Keith v. Ferry County,* No. 38761-5-III, (Wash. Ct. App. Dec. 06, 2022) (unpublished) responded in direct conflict with Supreme Court binding authority, citing its own cases to hold, "A formal conveyance by deed is not required" (Appendix. P. 5-6)

> ….owners of property can create a public road " 'by presenting for filing a final plat or short plat that shows the dedication [of the road] on its face.' " Bunnell v. Blair, 132 Wn. App. 149, 154, 130 P3d. 423 (2006) (quoting Richardson v. Cox, 108 Wn. App. 881, 891, 26

> P.3d 970 (2001)). A formal conveyance by deed is not required.

THE RECORD OF CONVEYANCES AND GRANTOR-GRANTEE INDEXES

In 1990, the Supreme Court accepted for review Ellingsen v. Franklin Cty., 785 P.2d 826 (1990) an unpublished opinion of the Court of Appeals, Ellingsen v. Franklin Cty., 55 Wn. App. 532, 778 P.2d 1072 (1989) regarding a disputed right-of-way to a county road. In reversing the Court of Appeals, Ellingsen v. Franklin Cty., 117 Wn.2d 24, 810 P.2d 910 (1991) The Supreme Court held, citing Kroetch v. Hinnenkamp, 171 Wash. 518, 521-22, 18 P.2d 491 (1933)

> It is important that a purchaser of real property . . . may rely upon a title which the record shows to be in his grantor, and that *he is not required*, in the absence of notice [not here present] . . . *to make inquiry as to the status of the title outside of that shown by the recorded conveyances* and the payment of taxes.

The recorded conveyances prove 100% ownership of the disputed right-of-way is vested in Mr. Keith. For the Court's

convenience, a copy of the recorded conveyances to Mr. Keith's property is produced below. (CP 077)

Ownership

Owner's Name	Ownership %
KEITH, MARC R	100 %

Sales History

Sale Date	Sales Document	# Parcels	Excise #	Grantor	Grantee	Price
03/27/08	SWD-271350	2	2008124	SIMENSON, HARRY L & RUTH E	KEITH, MARC R & VIVIAN I	$145,500
06/03/05	QCD-262282	2	2005279	SIMENSON, HARRY L	SIMENSON, HARRY L & RUTH E	$0
03/08/05	SWD-261598	2	2005112	SCHINNELL, DARYL & LINDA	SIMENSON, HARRY L & RUTH E	$111,000
07/06/92	QCD-221417	2	28663	WUTZKE, MARC & LINDA &	SCHINNELL, DARYL & LINDA	$0
07/01/86	SWD 202200	2	24463	RAVE, JOHN L &	WUTZKE, MARC & LINDA &	$11,000

The original conveyance [of twenty acres] to the Wutzkes was July 1, 1986, by SWD-202200. The short plat was filed on June 1, 1992, but there is no entry on that date for a county road easement which must be recorded pursuant to the Supreme Court's holdings in *Kesinger*, *Ellingsen* and *Bing*. The next entry in Mr. Keith's chain of title is July 6, 1992, when his predecessor was granted all interest by QCD-221417. (CP-389)

Reversing the Court of Appeals in *Ellingsen*, the Supreme Court held,

> If it were held that a document is constructive notice of its content because it is designated a public record or because the office in which it is filed is an office of

> record, the consequences *would be disastrous to the stability and certainty heretofore provided by recording with the county auditor and the* ***grantor-grantee index required by RCW 65.04***. (emphasis added)

The holding of the Court of Appeals in the instant case conflicts with the Supreme Court holding presented above in *Ellingsen*,

> Here, Mr. Keith raises new and old arguments why our previous decision was wrong. These arguments are: (1) encumbrances on property must be by deed, (2) no right-of-way deed was created in 1992, (3) grants require legislative body approval, (4) the Wutzkes conveyed Lot 1 twice, (5) Mr. Keith is a bona fide purchaser, (6) county roads must be recorded in the auditor's office, (7) no county road was established, and (8) there was an unconstitutional taking.
>
> In general response to these arguments, we note that when Mr. Keith purchased Lot 1, the short plat was recorded, and it was or should have been obvious that "Empire Cr. Co. Rd." meant Empire Creek *County* Road.

Dec. 6, 2022, unpublished opinion, Appendix. P 5.

The above-cited Court of Appeals holding conflicts with the Supreme Court in *Ellingsen*, by apparently reasoning the short plat was recorded; the dedication was on the face of the short plat; so it should have been obvious there was [constructive notice of] Empire Creek *County* Road.

With respect to the Court of Appeals, short plats do not encumber property, deeds do. RCW 64.04.010 (*Kesinger*) Conveyance of an easement is subject to the statute of frauds, and requires a deed to establish an easement. (*Berg v. Ting*)

The Supreme Court in *Ellingsen* held, regarding the unrecorded county road referenced previously, repeated here,

> If it were held that a document is constructive notice of its content because it is designated a public record or because the office in which it is filed is an office of record, the consequences *would be disastrous to the stability and certainty heretofore provided by recording with the county auditor and the grantor-grantee index required by RCW 65.04.* (emphasis added)

Ferry County did not produce the auditor's grantor-grantee index at trial, so a courtesy copy of the relevant part of the grantee index is produced below.

0221132	I - WD	02:11:00 PM 06/01/1992		ZOLD	DONALD	E	GRANTEE *
0221132	I - WD	01:10:00 PM 06/01/1992		ZOLD	BARBARA	A	GRANTEE *
0221127	I - LIEN	01:10:00 PM 06/01/1992		ST OF WA DSHS DCS			GRANTEE *
0221125	I - SPSURVEY	08:41:00 AM 06/01/1992	1-84	PUBLIC,THE			GRANTEE *
0221124	I - SP	08:08:00 AM 06/01/1992		PUBLIC			GRANTEE *
		08:37:00 AM					

The two entries from book 1 page 84 on June 1, 1992, record a short plat (SP) 0221124 and a short plat survey (SPSURVEY) 0221125, but no grant, dedication, or county road.

The Court of Appeals opinion further conflicts with the Supreme Court's holdings in *Ellingsen* and *Bing*, citing its previous opinion, *Keith v. Ferry County*, No. 37526-9-III, slip op. at 2-7 (Wash. Ct. App. Mar. 30, 2021) (unpublished)

> We affirmed the summary judgment dismissal. We noted that the short plat map depicted the road, identified as "*Empire Cr. Co. Rd. #552," and next to the road's cul-de-sac on Lot 1, the map indicated, "end county maintained road." Clerk's Papers (CP) at 245. We also concluded that Wutzke/Schinnell, the original owners of the property depicted in the short plat, clearly dedicated the road to the County, and the County clearly accepted it. We also additionally held that because the short plat was unambiguous, parol evidence could not be used to contradict it. (Appendix P. 2-3)

Respectfully, Mr. Keith's statutory warranty deed, record of conveyances, the grantor-grantee index, and payment of taxes are not parol evidence. They are dispositive pursuant to the Supreme Court's holding in *Ellingsen*, (citing *Kroetch*), that a purchaser

can rely on a title the record shows to be in his grantor, and he is not required,

> *. . . to make inquiry as to the status of the title outside of that shown by the recorded conveyances* and the payment of taxes.

Title, recorded conveyances, and payment of taxes vest 100% ownership in Mr. Keith pursuant to *Ellingsen*.

THE FIRST CONVEYANCE OF AN UNACCEPTED DEDICATION REVOKES THE OFFER.

Ferry County claimed no interest in the disputed area as it was repeatedly conveyed and taxed as real property for twenty-four years from 1992 to 2016.

The Supreme Court in *Smith v. King County*, 80 Wash. 273, 141 P. 695 (1914)

> A dedication of land to the use of the public, whether express or implied, may be revoked at any time before it has been accepted. Norfolk v. Nottingham, supra. It has also been held, and upon sound ground, *that a conveyance of an unaccepted street or highway revokes the dedication*. Railway Co. v. Town, 105 Iowa, 198, 74 N. W. 933; Clendenin v. Maryland, etc., 86 Md. 80, 37

> Atl. 709; 9 Am. & Eng. Enc. Law (2d Ed.) 78. It may also be revoked by applying the highway to any permanent use inconsistent with the purpose of the dedication. Trerice v. Barteau, 54 Wis. 99, 11 N. W. 244; Lea v. Lake, 14 Mich. 12, 90 Am. Dec. 220; Field v. Village, etc., 32 Mich. 279.
>
> Upon the entire record, we are constrained to hold that the learned trial court was in error in concluding that any part of the property in controversy was a public highway.
>
> The judgment is reversed, with directions to enter a decree enjoining the respondents from proceeding further. (italics and underlining added)

PERJURY BY FERRY COUNTY ASSESSOR COLEEN COX.

Ferry County waived argument below on the issue of perjury by their own tax assessor to defeat Mr. Keith's proof of taxes.

The first time this case was before the Court of Appeals, *Keith v. Ferry County*, No. 37526-9-III, slip op. at 2-7 (Wash. Ct. App. Mar. 30, 2021) (unpublished) Page 15, (CP-257) *before* the perjury of Coleen Cox was discovered, the court held,

> We have carefully reviewed Mr. Keith's amended complaint and find no claim that remains viable. His alleged payment of taxes is raised only as evidence of the allegedly private character of the road and the County's alleged nonacceptance of the right-of-way.

After Mr. Keith exposed assessor Coleen Cox's perjury, the December 6, 2022 Court of Appeals opinion substantially conflicts with its previous opinion.

> Mr. Keith next argues that Ferry County Chief Deputy Assessor Coleen Cox lied under oath about his payment of taxes on the roadway. She testified that the taxes assessed were for Lot 1, not Lot 1 and the road. He claims that the clear intent of the perjury was to defeat his claim that he paid taxes on the road for seven successive years and thereby obtained statutory title.
>
> Mr. Keith's claim to statutory title rests on RCW 7.28.070, a form of adverse possession. But the law is clear in Washington that one cannot adversely possess public property. *Michel v. City of Seattle*, 19 Wn. App. 2d 783, 795,498 P.3d 522 (2021), *review denied*, 199 Wn.2d 1012, 508 P.3d 671 (2022). Mr. Keith's claim of statutory title through adverse possession had no legal merit, so Ms. Cox's purported lie was of no consequence. The trial court did not abuse its discretion by denying the motion to vacate based on a purported lie that had no effect on the outcome of the case.
> (Dec. 6, 2022 opinion, Appendix. P. 6-7)

Trivializing undisputed perjury by a public official, the Court of Appeals conflicted with binding authority cited above in *Kesinger*, *Ellingsen*, and *Berg*, by holding the disputed area is public property despite the absence of a deed, chain of title, etc.

Furthermore, the record before the court proves that Mr. Keith never claimed to have received statutory title by adversely possessing county property. He received statutory title by warranty deed at purchase. (CP 018-019)

The undisputed perjury by assessor Coleen Cox, cited by the Superior Court in its summary judgment of dismissal, (CP 239) and which caused conflicting Court of Appeals holdings on the same issue in the same case, merits Supreme Court review.

PERJURY BY A GOVERNMENT OFFICIAL IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE-RAP 13.4(b)(4)

There can be few issues with greater substantial public importance requiring the attention of the Supreme Court than the honesty and ethics of public officials, especially when they're under oath.

If this court grants review and determines Mr. Keith's claims to the disputed right-of-way are based on his statutory warranty deed, (CP 018-019) record of conveyances, (CP 077) the grantor-grantee index, and payment of taxes, (CP 020-023) pursuant to

Supreme Court holdings in *Kesinger*, *Ellingsen*, and *Bing*, and not adverse possession of county property, it will see that the perjury by Assessor Coleen Cox caused the summary judgment of dismissal, and its affirmation by the Court of Appeals. The Supreme Court will also see that Ms. Cox's perjury, suborned more than three years *after* Ferry County clandestinely took Mr. Keith's property, is part of a larger conspiracy to commit forgery, real estate, title and mortgage fraud, and public corruption.

This is clearly criminal, under state and federal law. A Veteran's Administration mortgage was secured (CP-266) to falsely enrich the Wutzkes for conveyance by deed of unrecorded interest (CP 330-333) in Mr. Keith's unconstitutionally taken property.

The Court of Appeals held, regarding Wutzkes subsequent conveyance of interest in Mr. Keith's property, after previously conveying (CP-389) *all interest*,

> ….It is true the original owners conveyed "all interest" they had in Lot 1, to Mr. Keith's predecessor. CP at 389. However, the original owners signed the deed three

> weeks *after* the short plat was recorded. By the time the original owners signed the quitclaim deed, they had no interest in the County road. The quitclaim deed is irrelevant. The trial court did not abuse its discretion by denying the motion to vacate based on the nondisclosure of a deed that had no effect on the outcome of the case. (underline added) Dec. 6, 2023, opinion, Appendix. P. 8

If, as the Court of Appeals held, the Wutzkes *'conveyed all interest they had',* instead of *all interest* as shown on the recorded deed (CP 389) to Mr. Keith's predecessor, it begs the question where is the deed to the [unrecorded] interest they didn't have? (RCW 64.04.010, *Berg*) It's undisputed no right-of-way deed conveyed an easement to Ferry County. The conflict with *Berg* regarding the statute of frauds merits review by the Supreme Court.

Undoubtedly, it was a simple clerical error of the auditor in 1992 by filing a short plat containing a dedication without legislative body approval in conflict with RCW 58.17.190. Twenty-four years later, this clerical error was exploited by Ferry

County and the Wutzkes et al, to deprive Mr. Keith of property without due process of law.

CONSTITUTIONAL QUESTION OF LAW - RAP 13.4 (b)(3)

Issue 2 is undisputed. Ferry County, without notice to Mr. Keith, conducted an ex parte land-use hearing (CP 436-437 North Empire Creek Road Discussion) at the insistence of Mr. Keith's hostile neighbors, none of whom had an easement to use the disputed right-of-way as a shortcut across Mr. Keith's property to the terminus of the county road, one-half mile east. It is also undisputed that immediately after obtaining resolution 2016-21, the Wutzkes conveyed Lot 2, granting unrecorded interest in the disputed right-of-way by conveying dedications shown on the survey. (CP-266, 317, 330-333)

Mr. Keith was denied opportunity to challenge the witnesses, which included a United States Postmaster, or the forgeries produced and submitted (CP 300-303, 313-315, 381, 384, 425-432) to the ex parte land-use hearing, or to present his own statements or evidence. The Court of Appeals considered the ex

parte, false, and slanderous gaslighting of Mr. Keith as verity when it held,

> Beginning no later than June 11, 2013, Mr. Keith began taking actions that interfered with others' use of the portion of Empire Creek Road that is located within lot 1. In June 2013, he relocated several neighbors' mailboxes. He later erected fences and gates that interfered with the public right-of-way. He continued to make it known to County employees that he did not believe a public right-of-way existed on his property.

Mr. Keith contests all the above except the last sentence, which proves Ferry County, ***and*** the Court of Appeals, knew this was a contested land-use action. It was clearly unconstitutional to conduct the process behind closed doors without notice to the affected landowner, enact resolution 2016-21, and then immediately eject Mr. Keith from his deeded property. Review should be granted to resolve this important constitutional issue.

F. CONCLUSION

Mr. Keith understands review of unpublished opinions is rarely granted. However, this case relies on *Ellingsen v. Franklin Cty.*, 117 Wn.2d 24, 810 P.2d 910 (1991) as binding authority, which itself was review of an unpublished opinion *Ellingsen v. Franklin Cty.*, 785 P.2d 826 (Wash. 1990) of the Court of Appeals Div. III, which conflicts in the instant case with the exact same issue the Supreme Court reversed in *Ellingsen*. (holding county roads must be recorded in the auditor's grantor-grantee index and record of conveyances)

Mr. Keith respectfully asks this court to accept review and,

(1) Hold ex parte county commissioner resolution 2016-21 (CP-026) unconstitutional, ultra vires and void.

(2) Reverse the denial of vacation, and order Mr. Keith's title quieted in him.

(3) Enter orders requiring the Ferry County prosecutor to remove the legislatively unaccepted dedication from the record, pursuant to RCW 58.17.190.

(4) Enter order to vacate the county road created across Mr. Keith's property by resolution 2016-21, pursuant to RCW 36.87.080 as a court of competent jurisdiction.

(5) Hold the subsequent conveyance of interest (…dedications…shown on the survey thereof) across Mr. Keith's Lot one by the Wutzke/Wilton deed (CP 332-333) void as against Mr. Keith's title pursuant to RCW 65.08.070. Mr. Keith's predecessor recorded his deed to all interest in Lot one first, twenty-four years earlier.

(6) Enter order requiring Mr. Keith to be compensated for the unconstitutional and unlawful taking in an amount to be determined by later trial in state or federal court.

This document contains 3,974 words, excluding parts of the document exempted from the word count by RAP 18.17.

February 17, 2023

Respectfully submitted,

Marc R. Keith, [S] *Marc R. Keith*

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315-236-0496

APPENDIX TO PETITION FOR REVIEW

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FILED
DECEMBER 6, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARC R. KEITH, Appellant, v. FERRY COUNTY, WASHINGTON and ALL PERSONS CLAIMING ANY RIGHT, TITLE OR INTEREST IN THE REAL PROPERTY DESCRIBED HEREIN, Respondent.	)	No. 38761-5-III UNPUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — Marc Keith appeals the trial court's denial of his CR 60(b)(4) motion to vacate the final judgment in this matter. That rule permits a trial court to vacate a final judgment if there is clear and convincing evidence the judgment was obtained by fraud, misrepresentation, or other misconduct of an adverse party.

Mr. Keith raises numerous arguments on appeal—many involve rearguing issues he raised or could have raised in his previous appeal; others involve purported fraud,

misrepresentation, or other misconduct. We exercise our discretion to not review the first group of arguments. We review the second group of arguments and conclude they do not support vacating the judgment. We affirm the trial court.

FACTS

The underlying case arose from a dispute over whether the road in "Lot 1," a lot owned by Mr. Keith, was dedicated to and accepted by Ferry County (County) as a public right-of-way. *See Keith v. Ferry County*, No. 37526-9-III, slip op. at 2-7 (Wash. Ct. App. Mar. 30, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/375269_unp.pdf. Mr. Keith believed the road had not been dedicated to and accepted by the County. His amended complaint against the County requested a declaratory judgment and asserted ownership under color of title (occupation and payment of taxes for seven or more years) and inverse condemnation (unconstitutional taking). Eventually, Mr. Keith and the County brought cross motions for summary judgment.

The trial court entered an order granting the County's cross motion for summary judgment and dismissing Mr. Keith's claims. Mr. Keith appealed. We affirmed the summary judgment dismissal. We noted that the short plat map depicted the road, identified it as "*Empire Cr. Co. Rd. #552," and next to the road's cul-de-sac on Lot 1, the map indicated, "end county maintained road." Clerk's Papers (CP) at 245. We

concluded that Wutzke/Schinnell, the original owners of the property depicted in the short plat, clearly dedicated the road to the County, and the County clearly accepted it. We additionally held that because the short plat was unambiguous, parol evidence could not be used to contradict it.

Motion to vacate under CR 60(b)(4)

Within one year of our mandate, Mr. Keith, pro se, moved under CR 60(b)(4) for an order vacating the summary judgment order. On the same day, the court entered an order requiring the County to appear and show cause, if any, for why the court should not vacate its order. One month later, the County filed its memorandum opposing the motion.

The trial court held a hearing and heard extensive arguments by Mr. Keith. The court commented, "[I]t seems like you're relitigating issues that have already been decided by this Court." Report of Proceedings (RP) at 6. It requested Mr. Keith to "[t]ie this back to the fraud . . . [b]ecause . . . you're re-arguing everything that happened." RP at 9.

In January 2022, the trial court entered an order denying Mr. Keith's motion to vacate, accompanied by written findings of fact and conclusions of law. Specifically, the court found that: "11. Keith's motion argument presented at hearing largely focused on relitigating matters already conclusively determined." CP at 500.

The superior court concluded that:

> 6. Keith failed to show that the County withheld documents responsive to the discovery requests served upon the County. Moreover, the documents presented in support of Keith's motion are parol to the Wutzke/Schinnell short plat and cannot contradict the unambiguous plat.
>
> 7. Keith failed to show by clear and convincing evidence that fraud, misrepresentation, or other misconduct by the County caused entry of the April 7, 2020, order on cross motions for summary judgment.
>
> 8. Keith failed to show by clear and convincing evidence that the County engage[d] in conduct that prevented Keith from fully and fairly presenting his case.

CP at 502.

Mr. Keith timely appealed.

ANALYSIS

DENIAL OF MR. KEITH'S CR 60(b)(4) MOTION TO VACATE

Mr. Keith contends that the superior court abused its discretion by denying his motion under CR 60(b)(4) to vacate the summary judgment order.[1] We disagree.

Law of the case

We first address Mr. Keith's attempt to relitigate the issue of ownership of the

[1] In its concluding sentence, the summary judgment order states, "[T]he County is entitled to judgment as a matter of law dismissing the Plaintiff's claims with prejudice." CP at 240. We presume that such a judgment was issued. For this reason, we refer to the relief sought by Mr. Keith as vacation of the judgment, rather than vacation of the summary judgment order.

road. "Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes redeciding the same legal issues in a subsequent appeal." *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). In addition, the doctrine permits us to refuse to address issues that could have been raised in the prior appeal. *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 576, 338 P.3d 860 (2014).

Here, Mr. Keith raises new and old arguments why our prior decision is wrong. These arguments are: (1) encumbrances on property must be by deed, (2) no right-of-way deed was created in 1992, (3) grants require legislative body approval, (4) the Wutzkes conveyed Lot 1 twice, (5) Mr. Keith is a bona fide purchaser, (6) county roads must be recorded in the auditor's office, (7) no county road was established, and (8) there was an unconstitutional taking.

In general response to these arguments, we note that when Mr. Keith purchased Lot 1, the short plat was recorded, and it was or should have been obvious that "Empire Cr. Co. Rd." meant Empire Creek *County* Road. In addition, owners of property can create a public road "'by presenting for filing a final plat or short plat that shows the dedication [of the road] on its face.'" *Bunnell v. Blair*, 132 Wn. App. 149, 154, 130 P.3d

423 (2006) (quoting *Richardson v. Cox*, 108 Wn. App. 881, 891, 26 P.3d 970 (2001)). A formal conveyance by deed is not required.

If we were persuaded by any of his new or old arguments, we might exercise our discretion and reconsider our prior decision. But because we are unpersuaded, we apply the law of the case doctrine to these arguments.

We confine our review to those arguments by Mr. Keith in which he asserts fraud, misrepresentation, or other misconduct.

Standard of review

By its terms, CR 60(b)(4) permits a trial court to vacate a judgment for fraud, misrepresentation, or other misconduct of an adverse party. The decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). A court abuses its discretion if its decision is based on untenable grounds or is for untenable reasons. *Union Bank, NA v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 842, 365 P.3d 223 (2015).

Vacation of a judgment is an extraordinary remedy. *Dalton v. State*, 130 Wn. App. 653, 665, 124 P.3d 305 (2005). Under CR 60(b)(4), the moving party must show by clear and convincing evidence that the judgment was obtained by fraud, misrepresentation, or other misconduct of an adverse party. *Peoples State Bank v. Hickey*, 55 Wn. App. 367,

372, 777 P.2d 1056 (1989). "The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *Id*. "[T]he [mis]conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense." *Id.*

Purported misconduct of postal service or postmasters

Mr. Keith repeatedly asserts that the postal service and various postmasters engaged in assorted types of misconduct. These assertions are insufficient under CR 60(b)(4). The rule requires the misconduct to have been committed by an adverse party. The post office and the various postmasters are not adverse parties.

Purported misconduct of County employee Cox

Mr. Keith next argues that Ferry County Chief Deputy Assessor Coleen Cox lied under oath about his payment of taxes on the roadway. She testified that the taxes assessed were for Lot 1, not Lot 1 and the road. He claims that the clear intent of the perjury was to defeat his claim that he paid taxes on the road for seven successive years and thereby obtained statutory title.

Mr. Keith's claim to statutory title rests on RCW 7.28.070, a form of adverse possession. But the law is clear in Washington that one cannot adversely possess public property. *Michel v. City of Seattle*, 19 Wn. App. 2d 783, 795, 498 P.3d 522 (2021),

review denied, 199 Wn.2d 1012, 508 P.3d 671 (2022). Mr. Keith's claim of statutory title through adverse possession had no legal merit, so Ms. Cox's purported lie was of no consequence. The trial court did not abuse its discretion by denying the motion to vacate based on a purported lie that had no effect on the outcome of the case.

Recorded quitclaim deed from Wutzke to Mr. Keith's predecessor

Mr. Keith argues the County "held in their [sic] possession, but withheld from the court" the recorded quitclaim deed from the owners who filed the short plat application "conveying *all interest* [in Lot 1] to [my] predecessor in interest . . . ." Br. of Appellant at 32. It is true the original owners conveyed "all interest" they had in Lot 1 to Mr. Keith's predecessor. CP at 389. However, the original owners signed the deed three weeks *after* the short plat was recorded. By the time the original owners signed the quitclaim deed, they had no interest in the County road. The quitclaim deed is irrelevant. The trial court did not abuse its discretion by denying the motion to vacate based on the nondisclosure of a deed that had no effect on the outcome of the case.

Tampering with physical evidence/discovery violation

Mr. Keith argues the County tampered with the planning commission meeting minutes related to the short plat application. He asserts the record of the minutes should have been produced in discovery but instead was transferred to the state archives.

The record Mr. Keith identifies reflects a concern the planning commission had about the steepness of the road accessing lots 2, 3, and 4, and directs that a disclaimer be added to the short plat that adjacent landowners would be responsible for paying a proportionate cost to build the road to applicable standards.

In a similar vein, Mr. Keith argues the County violated discovery rules by not disclosing this document in discovery. The trial court reviewed Mr. Keith's discovery requests and determined that none of them encompassed the planning commission record.

Regardless, the record is of no consequence. First, it does not relate to Lot 1, Mr. Keith's lot. Second, Mr. Keith does not argue that production of the record would have made any difference in the outcome of the case. Nor can we conceive how this document would change the outcome.

As noted previously, we held that the short plat was unambiguous and that parol evidence was inadmissible to contradict the clear meaning of it. This means that the purportedly hidden document, even if it contradicted the short plat, would not be admissible for that purpose. Moreover, the document does not contradict the short plat. The trial court did not abuse its discretion by denying the motion to vacate based on nondisclosure of an inadmissible document.

County attorney's removal of adverse authority

Finally, Mr. Keith argues that the County's attorney, in a brief submitted to the trial court, provided an incomplete quote of the planning commission's findings that approved a variance to the short plat. More specifically, the attorney quoted the first two paragraphs of the findings but omitted the third paragraph. The omitted finding noted that access does not exist through the Boise property.

Mr. Keith asserts that the omitted finding "is dispositive evidence no county road was created." Br. of Appellant at 37. First, we do not agree that this information means no county road was created. In fact, we do not attach any significance to the omitted finding. Second, as previously noted, this information would be inadmissible to contradict the unambiguous short plat. The omission of this finding was of no consequence. The trial court did not abuse its discretion by denying the motion to vacate based on the omission of inadmissible evidence.

In conclusion, the trial court did not abuse its discretion in denying Mr. Keith's CR 60(b)(4) motion to vacate the judgment.

FILED
JANUARY 24, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

MARC R. KEITH,	)	**No. 38761-5-III**
	)	
Appellant,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
FERRY COUNTY, WASHINGTON and ALL PERSONS CLAIMING ANY RIGHT, TITLE OR INTEREST IN THE REAL PROPERTY DESCRIBED HEREIN,	)	**RECONSIDERATION**
	)	
Respondent.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated December 6, 2022, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Fearing, and Staab

FOR THE COURT:

Siddoway, C.J.

LAUREL SIDDOWAY
CHIEF JUDGE

Statutes

RCW 36.87.080

Majority vote required.

No county road shall be vacated and abandoned except by majority vote of the board properly entered, or by operation of law, or judgment of a court of competent jurisdiction.
[1969 ex.s. c 185 § 2; 1963 c 4 § 36.87.080. Prior: 1937 c 187 § 51, part; RRS § 6450-51, part.]

RCW 58.17.060

Short plats and short subdivisions—Summary approval—Regulations—Requirements.

(1) The legislative body of a city, town, or county shall adopt regulations and procedures, and appoint administrative personnel for the summary approval of short plats and short subdivisions or alteration or vacation thereof. When an alteration or vacation involves a public dedication, the alteration or vacation shall be processed as provided in RCW 58.17.212 or 58.17.215. Such regulations shall be adopted by ordinance and shall provide that a short plat and short subdivision may be approved only if written findings that are appropriate, as provided in RCW 58.17.110, are made by the administrative personnel, and may contain wholly different requirements than those governing the approval of preliminary and final plats of subdivisions and may require surveys and monumentations and shall require filing of a short plat, or alteration or vacation thereof, for record in the office of the county auditor: PROVIDED, That such regulations must contain a requirement that land in short subdivisions may not be further divided in any manner within a period of five years without the filing of a final plat, except that when the short plat contains

fewer than four parcels, nothing in this section shall prevent the owner who filed the short plat from filing an alteration within the five-year period to create up to a total of four lots within the original short plat boundaries: PROVIDED FURTHER, That such regulations are not required to contain a penalty clause as provided in RCW 36.32.120 and may provide for wholly injunctive relief.

An ordinance requiring a survey shall require that the survey be completed and filed with the application for approval of the short subdivision.

(2) Cities, towns, and counties shall include in their short plat regulations and procedures pursuant to subsection (1) of this section provisions for considering sidewalks and other planning features that assure safe walking conditions for students who walk to and from school.

[1990 1st ex.s. c 17 § 51; 1989 c 330 § 2; 1987 c 354 § 5; 1987 c 92 § 1; 1974 ex.s. c 134 § 3; 1969 ex.s. c 271 § 6.]

RCW 58.17.150

Recommendations of certain agencies to accompany plats submitted for final approval.

Each preliminary plat submitted for final approval of the legislative body shall be accompanied by the following agencies' recommendations for approval or disapproval:

(1) Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply;

(2) Local planning agency or commission, charged with the responsibility of reviewing plats and subdivisions, as to compliance with all terms of the preliminary approval of the proposed plat subdivision or dedication;

(3) City, town or county engineer.

Except as provided in RCW 58.17.140, an agency or person issuing a recommendation for subsequent approval under subsections (1) and (3) of this section shall not modify the terms of its recommendations without the consent of the applicant.
[1983 c 121 § 4; 1981 c 293 § 8; 1969 ex.s. c 271 § 15.]

RCW 58.17.190

Approval of plat required before filing—Procedure when unapproved plat filed.

The county auditor shall refuse to accept any plat for filing until approval of the plat has been given by the appropriate legislative body, or such other agency as authorized by RCW 58.17.100. Should a plat or dedication be filed without such approval, the prosecuting attorney of the county in which the plat is filed shall apply for a writ of mandate in the name of and on behalf of the legislative body required to approve same, directing the auditor and assessor to remove from their files or records the unapproved plat, or dedication of record.
[2017 c 161 § 3; 1969 ex.s. c 271 § 19.]

RCW 64.04.010

Conveyances and encumbrances to be by deed.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a

simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

[1929 c 33 § 1; RRS § 10550. Prior: 1888 p 50 § 1; 1886 p 177 § 1; Code 1881 § 2311; 1877 p 312 § 1; 1873 p 465 § 1; 1863 p 430 § 1; 1860 p 299 § 1; 1854 p 402 § 1.]

RCW 65.08.070

Real property conveyances to be recorded.

(1) A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

(2) A recording officer as defined in RCW 65.08.060(4) may accept for recording under this section a tangible copy of an electronic record containing a notarial certificate as satisfying any requirement that a record accepted for recording be an original, if the notarial officer executing the notarial certificate certifies that the tangible copy is an accurate copy of the electronic record under RCW 42.45.020(3).

[2019 c 154 § 9; 2012 c 117 § 208; 1927 c 278 § 2; RRS § 10596-2. Prior: 1897 c 5 § 1; Code 1881 § 2314; 1877 p 312 § 4; 1873 p 465 § 4; 1863 p 430 § 4; 1860 p 299 § 4; 1858 p 28 § 1; 1854 p 403 § 4.]

MARC KEITH - FILING PRO SE

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